

1 THE HONORABLE ROBERT S. LASNIK
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8 UNITED STATES DISTRICT COURT
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11 WESTERN DISTRICT OF WASHINGTON, AT SEATTLE
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14 SWINOMISH INDIAN TRIBAL
15 COMMUNITY, a federally recognized
16 Indian tribe,
17 Plaintiff,
18 v.
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20 BNSF RAILWAY COMPANY, a
21 Delaware corporation,
22
23 Defendant.

24 No. 2:15-cv-00543-RSL
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**BNSF RAILWAY COMPANY'S
AMENDED ANSWER TO COMPLAINT
FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, TRESPASS,
AND BREACH OF CONTRACT**

Pursuant to Federal Rules of Civil Procedure 8 and 15(a)(1)(A), defendant BNSF Railway Company ("BNSF"), through its counsel of record, hereby answers and asserts defenses and affirmative defenses to plaintiff's Complaint for Declaratory Judgment, Injunctive Relief, Trespass, and Breach of Contract ("Complaint"). BNSF's answer, defenses, and affirmative defenses are based on information and knowledge thus far secured by BNSF, and BNSF reserves the right to further amend or supplement its answer, defenses, or affirmative defenses based on facts later discovered, pleaded, or offered. To the extent that any express or implied allegations in the Complaint are not specifically admitted herein, BNSF denies such allegations.

BNSF RAILWAY COMPANY'S AMENDED
ANSWER TO COMPLAINT FOR DECLARATORY
JUDGMENT, INJUNCTIVE RELIEF, TRESPASS,
AND BREACH OF CONTRACT - 1
No. 2:15-cv-00543-RSL

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ANSWER

I. PARTIES

1.1 BNSF admits that plaintiff occupies the Swinomish Indian Reservation, but lacks information or knowledge sufficient form a belief as to the truth or falsity of the remaining allegations set forth in the Complaint's paragraph 1.1 and on that basis denies the allegations.

1.2 BNSF admits the allegations set forth in the Complaint's paragraph 1.2.

II. JURISDICTION AND VENUE

2.1 The allegations set forth in the Complaint's paragraph 2.1 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies that this Court has subject matter jurisdiction, in whole or in part, over the claims plaintiff asserts in this action.

2.2 The allegations set forth in the Complaint's paragraph 2.2 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies that this Court has subject matter jurisdiction, in whole or in part, over the claims plaintiff asserts in this action.

2.3 The allegations set forth in the Complaint's paragraph 2.3 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies that this Court has jurisdiction, in whole or in part, to grant plaintiff's requested relief.

2.4 The allegations set forth in the Complaint's paragraph 2.4 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies that this Court is an appropriate venue for this action for the aspects of plaintiff's claims that are subject to mandatory arbitration.

III. FACTUAL ALLEGATIONS

3.1 BNSF admits that plaintiff occupies certain reservation lands known as the Swinomish Reservation, that these lands are located on the Southeastern end of Fidalgo Island

BNSF RAILWAY COMPANY'S AMENDED
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1 in Skagit County, Washington, and that these lands are held in trust for plaintiff by the United
 2 States. BNSF lacks information or knowledge sufficient to form a belief as to the truth or
 3 falsity of the remaining allegations set forth in the Complaint's paragraph 3.1 and on the basis
 4 denies the allegations.

5 3.2 BNSF admits the allegations set forth in the Complaint's paragraph 3.2.

6 3.3 The allegations set forth in the Complaint's paragraph 3.3 contain legal
 7 conclusions to which no response is required. To the extent a response is required, BNSF
 8 admits that plaintiff and BNSF are parties to a Right-of-Way Agreement dated July 19, 1991,
 9 that a representative of the Bureau of Indian Affairs of the U.S. Department of the Interior
 10 executed the Right-of-Way Agreement, and that the document speaks for itself. BNSF denies
 11 the remaining allegations set forth in the Complaint's paragraph 3.3.

12 3.4 BNSF admits that the Right-of-Way is on the north end of the Reservation.
 13 BNSF lacks information or knowledge sufficient form a belief as to the truth or falsity of the
 14 allegations set forth in the Complaint's paragraph 3.4 and on that basis denies the remaining
 15 allegations.

16 3.5 BNSF lacks information or knowledge sufficient form a belief as to the truth or
 17 falsity of the allegations set forth in the Complaint's paragraph 3.5 and on that basis denies the
 18 allegations.

19 3.6 BNSF states that the Treaty of Point Elliot and the court's order in *United States*
 20 *v. Washington* speak for themselves. BNSF lacks information or knowledge sufficient to form
 21 a belief as to the truth or falsity of the remaining allegations set forth in the Complaint's
 22 paragraph 3.6 and on that basis denies the allegations.

23 3.7 BNSF admits that the Right-of-Way crosses a bridge over the Swinomish
 24 Channel and a bridge across Padilla Bay, both of which are within the Reservation. BNSF
 25 further states that the court's order in *United States v. Washington* speaks for itself. BNSF
 26 lacks information or knowledge sufficient to form a belief as to the truth or falsity of the

1 remaining allegations set forth in the Complaint's paragraph 3.7 and on that basis denies the
 2 allegations.

3 3.8 BNSF admits that the Right-of-Way Agreement was a result of a settlement of a
 4 prior lawsuit between plaintiff, the United States of America, and Burlington Northern Railroad
 5 Company. The allegations in that lawsuit speak for themselves. BNSF denies the remaining
 6 allegations set forth in the Complaint's paragraph 3.8.

7 3.9 The allegations set forth in the Complaint's paragraph 3.9 contain legal
 8 conclusions to which no response is required. To the extent a response is required, BNSF
 9 denies the allegations set forth in the Complaint's paragraph 3.9.

10 3.10 BNSF states that the Right-of-Way Agreement speaks for itself, and that BNSF
 11 makes annual rental payments to plaintiff which are subject to periodic adjustments. BNSF
 12 denies the remaining allegations set forth in the Complaint's paragraph 3.10.

13 3.11 BNSF admits that a representative of the Bureau of Indian Affairs of the
 14 Department of the Interior executed the Right-of-Way Agreement. The remaining allegations
 15 set forth in the Complaint's paragraph 3.11 contain legal conclusions to which no response is
 16 required. To the extent a response is required, BNSF denies the remaining allegations set forth
 17 in the Complaint's paragraph 3.11.

18 3.12 BNSF states that the Right-of-Way Agreement speaks for itself and denies the
 19 remaining allegations set forth in the Complaint's paragraph 3.12.

20 3.13 BNSF denies the allegations set forth in the Complaint's paragraph 3.13.

21 3.14 BNSF lacks information or knowledge sufficient to form a belief as to the truth
 22 or falsity of the allegations set forth in the first sentence of the Complaint's paragraph 3.14 and
 23 on that basis denies the allegations. BNSF denies the allegations set forth in the second
 24 sentence of the Complaint's paragraph 3.14. BNSF admits that the parties corresponded
 25 regarding the Right-of-Way Agreement and that BNSF is currently running approximately six
 26 100-car unit trains per week over the Right-of-Way in each direction and denies the remaining

1 allegations set forth in the third sentence of the Complaint's paragraph 3.14. BNSF admits that
 2 plaintiff has thus far refused to consent to the current level of rail traffic over the Right-of-Way
 3 and denies the remaining allegations set forth in the fourth sentence of the Complaint's
 4 paragraph 3.14.

5 3.15 BNSF admits that it has corresponded in writing with plaintiff as recently as
 6 March 13, 2015, regarding the Right-of-Way Agreement, that the correspondence speaks itself,
 7 and that the two parties were unable to reach agreement about the Right-of-Way Agreement.
 8 BNSF denies the remaining allegations set forth in the Complaint's paragraph 3.15.

9 3.16 BNSF admits that it is currently running approximately six 100-car unit trains
 10 per week over the Right-of-Way in each direction and denies the remaining allegations set forth
 11 in the Complaint's paragraph 3.16.

12 3.17 BNSF admits that the number of tank cars crossing plaintiff's reservation may
 13 increase upon completion of a proposed crude oil facility located at Match Point and denies the
 14 remaining allegations set forth in the Complaint's paragraph 3.17.

15 3.18 BNSF admits that it transports trains with approximately 100 cars to the Tesoro
 16 refinery at Match Point at the request of the shipper and that these trains can carry
 17 approximately 700 barrels of oil per car. BNSF denies the remaining allegations set forth in the
 18 Complaint's paragraph 3.18.

19 3.19 BNSF admits that the crude oil it ships across the Right-of-Way from the
 20 Bakken shale formation is sometimes referred to as "Bakken" crude. BNSF denies the
 21 remaining allegations set forth in the Complaint's paragraph 3.19.

22 3.20 BNSF states that U.S. Department of Transportation order speaks for itself and
 23 denies the remaining allegations set forth in the Complaint's paragraph 3.20.

24 3.21 BNSF states that the U.S. Pipeline and Hazardous Materials Safety
 25 Administration report speaks for itself and denies the remaining allegations set forth in the
 26 Complaint's paragraph 3.21.

1 3.22 BNSF states that the U.S. Department of Transportation order speaks for itself
 2 and denies the remaining allegations set forth in the Complaint's paragraph 3.22.

3 3.23 BNSF states that the U.S. Department of Transportation discussion speaks for
 4 itself and denies the remaining allegations set forth in the Complaint's paragraph 3.23.

5 3.24 BNSF admits that the DOT-111 and CPC-1232 cars are among the types of rail
 6 tank cars that can be used to transport crude oil. BNSF states that the National Transportation
 7 Safety Board's reports speak for themselves and denies the remaining allegations set forth in
 8 the Complaint's paragraph 3.24.

9 3.25 BNSF states that the testimony of Mr. Hart and Mr. Hamberger speaks for itself
 10 and denies the remaining allegations set forth in the Complaint's paragraph 3.25.

11 3.26 BNSF admits that it has used CPC-1232 cars, among others, for rail shipments
 12 to the March Point refinery at the request of Tesoro. BNSF denies the remaining the
 13 allegations set forth in the Complaint's paragraph 3.26.

14 3.27 BNSF admits that a BNSF train derailed in Galena, Illinois in March of 2015.
 15 BNSF further admits that a BNSF train derailed in Seattle, Washington in July of 2014. BNSF
 16 further admits that a BNSF train derailed in December of 2013 near Casselton, North Dakota.
 17 BNSF further admits that it is aware of the reported train-related incidents alleged in
 18 subsections (a), (c), (e), (g), and (h) of the Complaint's paragraph 3.27, but lacks information or
 19 knowledge sufficient to form a belief as to the truth or falsity of those allegations and on that
 20 basis denies them. BNSF denies the remaining allegations set forth in the Complaint's
 21 paragraph 3.27.

22 3.28 BNSF states that the Right-of-Way Agreement speaks for itself and denies the
 23 remaining allegations set forth in the Complaint's paragraph 3.28.

24 3.29 BNSF admits that plaintiff recently requested annual reports and that BNSF
 25 provided information to plaintiff regarding materials being shipped across the Reservation.
 26 BNSF denies the remaining allegations set forth in the Complaint's paragraph 3.29.

1 3.30 BNSF admits that at the request of a shipper it began shipping Bakken crude
 2 over the Right-of-Way in 2012. BNSF states that the remaining allegations set forth in
 3 paragraph 3.30 contain legal conclusions to which no response is required. To the extent a
 4 response is required, BNSF denies the remaining allegations set forth in the Complaint's
 5 paragraph 3.30.

6 3.31 BNSF admits that plaintiff has expressed concern with the shipment of crude oil
 7 across the Right-of-Way and denies the remaining allegations set forth in the Complaint's
 8 paragraph 3.31.

9 3.32 BNSF states that the allegations set forth in paragraph 3.32 contain legal
 10 conclusions to which no response is required. To the extent a response is required, BNSF
 11 denies the remaining allegations set forth in the Complaint's paragraph 3.32.

IV. FIRST CLAIM FOR RELIEF

(Declaratory Judgment)

14 4.1 BNSF realleges and incorporates by reference its responses to the Complaint's
 15 preceding paragraphs as though fully stated herein.

16 5.1 BNSF states that the Right-of-Way Agreement speaks for itself and denies the
 17 remaining allegations set forth in the Complaint's paragraph 5.1.

18 5.2 BNSF states that the allegations set forth in paragraph 5.2 contain legal
 19 conclusions to which no response is required. To the extent a response is required, BNSF
 20 denies the allegations set forth in the Complaint's paragraph 5.2.

21 5.3 BNSF states that the allegations set forth in paragraph 5.3 contain legal
 22 conclusions to which no response is required. To the extent a response is required, BNSF
 23 denies the allegations set forth in the Complaint's paragraph 5.3.

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V. SECOND CLAIM FOR RELIEF

(Injunctive Relief)

6. BNSF realleges and incorporates by reference its responses to the Complaint's preceding paragraphs as though fully stated herein.

7.1 BNSF states that the allegations set forth in paragraph 7.1 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations set forth in the Complaint's paragraph 7.1.

7.2 BNSF states that the allegations set forth in paragraph 7.2 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations set forth in the Complaint's paragraph 7.2.

VI. THIRD CLAIM FOR RELIEF

8. BNSF realleges and incorporates by reference its responses to the Complaint's preceding paragraphs as though fully stated herein.

9. BNSF states that the allegations set forth in paragraph 9 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations set forth in the Complaint's paragraph 9.

10. BNSF states that the allegations set forth in paragraph 10 contain legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations set forth in the Complaint's paragraph 10.

VII. FOURTH CLAIM FOR RELIEF (Breach of Easement Agreement)

11. BNSF realleges and incorporates by reference its responses to the Complaint's preceding paragraphs as though fully stated herein.

1 12. BNSF states that the allegations set forth in paragraph 12 contain legal
2 conclusions to which no response is required. To the extent a response is required, BNSF
3 denies the allegations set forth in the Complaint's paragraph 12.

4 13. BNSF states that the allegations set forth in paragraph 13 contain legal
5 conclusions to which no response is required. To the extent a response is required, BNSF
6 denies the allegations set forth in the Complaint's paragraph 13.

VIII. RELIEF REQUESTED

BNSF is not obligated to respond to plaintiff's request for relief. To the extent a response is required, BNSF denies that plaintiff is entitled to any relief.

BNSF'S DEFENSES AND AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a claim for which relief can be granted.

12 2. Plaintiff's claims are barred in whole or in part because BNSF has not materially
13 breached any agreement between the parties.

14 3. Plaintiff's claims are barred in whole or in part because this Court lacks subject
15 matter jurisdiction.

16 4. Plaintiff's claims are barred in whole or in part because they are preempted by
17 the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501, *et seq.*, which
18 regulates rail transportation, and all such regulation falls within the exclusive jurisdiction of the
19 Surface Transportation Board.

20 5. The relief plaintiff requests in connection with its claims is barred in whole or in
21 part because it is preempted by the Interstate Commerce Commission Termination Act, 49
22 U.S.C. § 10501, *et seq.*, which regulates rail transportation, and all such regulation falls within
23 the exclusive jurisdiction of the Surface Transportation Board.

24 6. Plaintiff's claims are barred in whole or in part by the independent duty doctrine
25 (formerly known as the economic loss doctrine).

1 7. Plaintiff's claims are barred in whole or in part by the doctrine of waiver and
2 estoppel.

3 8. Plaintiff's claims are barred in whole or in part by the doctrine of laches.

4 9. Plaintiff's claims are barred in whole or in part based on the various statutes of
5 limitations governing such claims.

6 10. Plaintiff's claims are barred in whole or in part because plaintiffs materially
7 breached the Right-of-Way Agreement by, among other things, arbitrarily withholding its
8 consent under the Right-of-Way Agreement.

9 11. Plaintiff's claims are barred in whole or in part because plaintiff cannot prove it
10 was damaged by BNSF's actions.

11 12. Plaintiff's claims are barred in whole or in part because plaintiff's claims are
12 subject to binding arbitration and thus this Court is not the proper venue to litigate such claims.

13 13. Plaintiff's claims are invalid and unenforceable to the extent that they are based
14 upon a violation of, or would otherwise require BNSF to violate, governing laws and
15 regulations.

16 14. The above defenses and affirmative defenses are based on the facts and
17 information currently known to BNSF. BNSF reserves the right to amend or add defenses or
18 affirmative defenses based on facts later discovered, pleaded, or offered

BNSF'S PRAYER FOR RELIEF

Having set forth its answer, defenses, and affirmative defenses to plaintiff's Complaint, BNSF respectfully requests that the Court grant it the following relief:

- 22 A. Dismissal with prejudice of the Complaint and each of its claims;

23 B. BNSF's costs and reasonable attorneys' fees in connection with this lawsuit, as

24 allowed in law or equity; and

25 C. Such other and further relief as the Court may deem just and equitable.

1 Respectfully submitted this 19th day of October, 2015.
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s/ Stellman Keehnel

s/ Andrew R. Escobar

s/ Jeffrey B. DeGroot

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10 Attorneys for defendant BNSF Railway Company
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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties.

Dated this 19th day of October, 2015.

s/ Andrew R. Escobar
Andrew R. Escobar, WSBA No. 42793

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